No. 14-1504

In the Supreme Court of the United States

ROBERT J. WITTMAN, *ET AL.*,
APPELLANTS,

V.

GLORIA PERSONHUBALLAH, *ET AL.*,
APPELLEES.

On Appeal From The United States District Court For The Eastern District Of Virginia

BRIEF OF ALABAMA AND TEXAS AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

1. Did the court below err in failing to make the required finding that race rather than politics predominated in District 3, where there is no dispute that politics explains the Enacted Plan?

2. Did the court below err in relieving Plaintiffs of their burden to show an alternative plan that achieves the General Assembly's political goals, is comparably consistent with traditional districting principles, and brings about greater racial balance than the Enacted Plan?

3. Regardless of any other error, was the court below's finding of a Shaw violation based on clearly erroneous fact-finding?

4. Did the majority err in holding that the Enacted Plan fails strict scrutiny because it increased District 3's black voting-age population percentage above the benchmark percentage, when the undisputed evidence establishes that the increase better complies with neutral principles than would reducing the percentage and no racial bloc voting analysis would support a reduction capable of realistically securing Section 5 preclearance?

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INTEREST OF AMICI CURIAE

The amici States[1] redistrict every ten years for Congress and state legislatures. They want to draw lines that comply with the Constitution and the Voting Rights Act, but find it increasingly difficult to meet these dual, and sometimes inconsistent, requirements. The amici States have a strong interest in clear redistricting law that will allow legislatures to perform their redistricting function, prevent lawyer-driven litigation, and protect the rights of all voters.

The lower court's judgment imposes unrealistic and incompatible requirements on redistricters. It also threatens to create a vicious cycle of federal litigation after every decennial redistricting. The amici States therefore ask this Court to reverse the district court's judgment.

SUMMARY OF ARGUMENT

Redistricting is a minefield. And the path through it is not well-marked. A state legislature seeking to comply with federal law must think about race enough, but not too much; draw majority-minority districts when required, but shun them (even if the Department of Justice demands them) if the district is not sufficiently compact; place enough minority voters into the district to elect a candidate of choice, but not so many that the district is "packed." A step

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[1] The *amici* States do not need consent of the parties to file this brief. *See* Sup. Ct. R. 37(4).

in either direction off the narrow legal path leads to liability, attorneys' fees, and another trip through the minefield.

The lower court's decision makes the path through the minefield even more treacherous. The Court should reverse the lower court and adopt four holdings that will ensure that it is possible for redistricters going forward to draw districts that comply with federal law:

1. A dispute over three population percentage points should not be enough to make a racial gerrymandering claim. Virginia is criticized for drawing a 56.3% black district when it was previously a 53.1% black district. If 3 percentage points is sufficient to make a racial gerrymandering claim, then States will be faced with such precise requirements that it will be practically impossible to meet their legal obligations without costly litigation.

2. States ought not be required to conduct extensive studies of voter registration, voter turnout, and election results for individual districts to prove that they have a "strong basis in evidence" in support of their choices. A good-faith state-wide determination, of the sort that Virginia made, should suffice.

3. This Court should reaffirm that, at a minimum, plaintiffs in a racial-gerrymandering claim are required to show, through an alternative map, that the legislature could have reached its political goals in an alternative way while achieving *significantly* greater racial balance. *Easley v. Cromartie*, 532 U.S. 461 (2003).

4. This Court should also hold that to show that race predominated over traditional districting principles, a plaintiff must prove that the State's use of race *contradicted* those districting principles.

The amici States ask for these holdings not as a safe harbor for racial discrimination, but to ensure that there is meaning to this Court's acknowledgment that "[t]he law cannot lay a trap for an unwary legislature." *ALBC v. Alabama*, 135 S. Ct. 1257, 1273–1274 (2015).

ARGUMENT

The amici States embrace the Constitution's prohibitions against racial discrimination and the goal of the Voting Rights Act "to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003). But federal law presently requires a near fixation on race that imposes inconsistent demands on line-drawers. The result is that States have little room to operate, their legal responsibilities are ill-defined and ever-changing, and legislatures must defend every redistricting plan in court.

The lower court's decision exacerbates the difficulty of complying with federal law. It should be replaced with a decision that recognizes a field of operation between what the Voting Rights Act requires and the Equal Protection Clause prohibits.

I. The Court should not recognize a new *Shaw-Miller* claim that makes it even more difficult for legislatures to comply with the Voting Rights Act and the Constitution at the same time.

The district court imposed an erroneous, too-exacting standard that exacerbates the States' difficulty in complying with the competing requirements of the Voting Rights Act and Constitution. It has become axiomatic that the Voting Rights Act and Equal Protection Clause impose inconsistent, and sometimes incompatible, obligations on States in redistricting. "On one hand, States will risk violating the Voting Rights Act if they fail to create majority-minority districts. If they create those districts, however, they may open themselves to liability under [the Equal Protection Clause]". *Bush v. Vera*, 517 U.S. 952, 1037 (1996) (Stevens, J., dissenting).

The Constitution counsels against racial classifications. "Classifications of citizens solely on the basis of race 'are by their very nature odius to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw v. Reno*, 509 U.S. 630, 643 (1993) ("*Shaw I*"). The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, § 1. It follows from that principle that "government may treat people differently because of their race only for the most compelling reasons." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

But this Court's interpretation of the Voting Rights Act requires redistricters to draw majority-minority districts to protect the ability of minority voters to elect candidates of their choice. Section 2 requires these districts if the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district," is "politically cohesive," and when "the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986);[2] *see also* 52 U.S.C. § 10301. For States that were subject to Section 5 of the Voting Rights Act, 52 U.S.C. § 10304, a plan that did not maintain the same number of majority-minority districts as in a previous plan would not have been precleared. As Justice Kennedy has explained, "considerations of race that would doom a redistricting plan under the Fourteenth Amendment or §2 seem to be what save it under §5." *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring).

Indeed, although the Voting Rights Act requires that States draw majority-minority districts, this Court has held that States may *not* draw such districts "to segregate voters into separate voting districts because of their race" without sufficient justification. *Shaw I*, 509 U.S. at 658. A district is

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[2] Of course, liability under Section 2 is established only if a plaintiff proves, based on the totality of the circumstances, that the failure to draw a majority-minority district denies members of the relevant minority group the equal opportunity to "participate in the political process and to elect representatives of their choice," 52 U.S.C. § 10301(b).

subject to strict scrutiny if a plaintiff proves "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *see also Shaw v. Hunt*, 517 U.S. 899, 905 (1996) ("*Shaw II*"). And sufficient justification does not exist – the district is not narrowly tailored to serve a compelling State interest – when the district is so irregular that drawing it was not necessary to comply with § 5's anti-retrogression requirement or the requirements of § 2. *Id.*

These "*Shaw-Miller*" claims have embroiled courts even further into redistricting and eliminated certainty for state legislatures. Now courts undertake a detailed, district-by-district analysis of compactness, precinct and county splits, demographics, and the like, for virtually every majority-minority district drawn. *See, e.g., Bush*, 517 U.S. 952. As a practical matter, it is impossible for State actors to know ex ante when race goes from being a permissible (and required) consideration to an impermissible "dominant and controlling" one. Redistricting has become "perilous work for state legislatures" and federal judges "in large numbers" have been "drawn into the fray." *Miller*, 515 U.S. at 949 (Ginsburg, J., dissenting).

The degree of uncertainty in the law is reflected in the number of legal challenges. By one count, all but eleven states have faced challenges to their Congressional or State legislative plans (or both), in over 200 lawsuits, since the 2010 census (and more than 30 of those cases are active). *See* Justin Levitt, All About Redistricting, available at

http://redistricting.lls.edu/cases.php#IN (last visited Dec. 28, 2015). In Appendix A to this brief, amici attach a list of known cases raising racial gerrymandering claims to plans drawn after the 2010 census.

In light of this background, the Court should be wary of recognizing the new flavor of *Shaw-Miller* claim presented by this case. The plaintiffs argue, not that the State erred in creating or preserving a majority-black district, but that the State went just a little too far in achieving its undisputed Voting-Rights-Act obligation. Unlike in *Shaw*, the plaintiffs concede that Section 5 required the government to maintain District 3 in the Virginia Congressional plan as an "ability-to-elect" district. They concede that the government had to consider race to ensure that the district allowed black voters the opportunity to elect a candidate of choice. And they concede, apparently, that the government would have been justified in maintaining a district that is 53.1% black.

The only meaningfully dispute is whether the government went too far by creating a district that is 56.3% black instead of 53.1% black. By recognizing this kind of claim, the district court effectively eliminated the zone of operation between the Constitution's prohibitions and the Voting Rights Act's demands. This Court should not make it even more difficult for legislatures to comply with the Voting Rights Act and the Constitution at the same time.

II. The Court should recognize a field of operation between the Voting Rights Act and the Constitution.

The district court made four discrete errors that this Court should rectify. By reversing the district court on each of these four points, the Court would provide much needed guidance and certainty to redistricters going forward.

A. States do not have to create majority-black districts with precise percentages.

The district court's first error was its conclusion that the 3% difference between the 53% black baseline district and the 56% black replacement district was constitutionally significant. The district court held that because Virginia put 3% more black persons in District 3 than "necessary," the district fails constitutional muster. That standard is both unwise and unfair.

First, requiring this kind of precision in redistricting eliminates any daylight between what the Voting Rights Act requires and the Constitution prohibits. "The law cannot lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) retrogressive under § 5 should the legislature place a few too few." *ALBC*, 135 S. Ct. at 1273–1274. The States should not have to hit a six-percent-wide "sweet spot." *See* Trans. of Oral Argument, *Alabama Democratic Conference v.*

Alabama, 13-895, 13-1138, at 5:13 (Nov. 12, 2014) (question of Chief Justice Roberts). But that is the standard that the district court imposed.

Second, such exacting judicial review of the minutiae of redistricting is contrary to the proper role of courts in evaluating redistricting challenges. The Court has long recognized that "'reapportionment is primarily a matter for legislative consideration and determination.'" *White v. Weiser*, 412 U.S. 783, 794 (1973) (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)). It requires drawing sometimes arbitrary, "inconsistent, illogical, and ad hoc" lines between groups of voters. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality). *Accord id.* at 306–07 (Kennedy, J., concurring in the judgment) (noting "lack of comprehensive and neutral principles for drawing electoral boundaries"). A legal standard that draws constitutional lines based on 3% of a district's population "risk[s] assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Id.* at 307 (Kennedy, J., concurring in the judgment).

Third, a 3% population difference does not reflect a "significant number" of people under this Court's racial gerrymandering caselaw. The Court has consistently directed lower courts to look at "significance" in evaluating racial gerrymandering claims. In *Miller*, the Court held that race is predominant only if a "significant number" of people are put in or out of a district in contravention to traditional districting principles. 515 U.S. at 916. *See also Easley*, 532 U.S. at 258 (requiring plaintiffs to produce an alternative plan showing that the

legislature could have achieved "*significantly* greater racial balance" while meeting its political goals) (emphasis added). When this Court said in *Miller* and *ALBC* that race predominates only when a "significant number" of people are moved in or out of a district, it meant something substantially more than three percentage points.

Finally, the district court ignored the reality that many majority-minority districts are naturally occurring at higher than 56% minority. Indeed, without abandoning traditional districting principles, it would be impossible in most cases for States to create majority-minority districts at lower than 56% black. *Cf. Wright v. Rockefeller*, 376 U.S. 52, 56–58 (1964) (recognizing that segregated residential patterns make such districts inevitable). If exceeding a benchmark by 3% is enough to give rise to a racial gerrymandering claim, States will have to defend these naturally-occurring districts in expensive and protracted litigation. And, in practice, redistricters will keep an even more watchful eye on race by seeking out people of the majority race to put in a district when it reaches the benchmark level of minority voters.

B. States can rely on a state-wide good faith judgment of how best to comply with federal law.

The district court's second error was its holding that state legislators must commission district-specific voter registration and voter turnout analysis before they can constitutionally draw majority-minority districts. Legislators frequently rely on

state-wide voter data, historical practices, and their own political experience to make determinations about how many minority voters need to be in a district to affect the outcome of the election in that district. This Court should reject the premise that States must undertake a series of detailed studies to determine precisely what size racial majority is needed in each district for minority voters to elect their candidate of choice. [3]

No one needs a study to know that the Voting Rights Act requires the government to ensure that the minority voters in a majority-minority district actually have the ability to elect a candidate of choice. Under Section 5, the legislature must show that size of the minority-voter population is sufficient for "minority voters [to] retain the ability to elect their preferred candidates." *ALBC*, 135 S. Ct. at 1273. And Section 2, as interpreted by this Court, requires the legislature to show that its enacted plan does not result in vote dilution. Either under Section 5 or Section 2, a legislature must put enough minority voters in an ability-to-elect district to avoid vote dilution or retrogression by giving politically

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[3] Some have criticized the use of any target at all. But, as another three-judge court recently held in Virginia, "[i]f the use of a BVAP threshold—any BVAP threshold—is sufficient to trigger strict scrutiny in the absence of a facial manifestation in the lines themselves through the subordination of traditional redistricting principles, then the constitutionality of the Voting Rights Act—as applied to redistricting—would be drawn into question." *Bethune-Hill v. Virginia State Board of Elections*, ___ F.Supp.3d ___, ____, 2015 WL 6440332 at *17 (E.D. Va. Oct. 22, 2015).

cohesive minority voters the ability to elect their candidate of choice.

Unlike the lower court, this Court has previously afforded legislators significant leeway in determining the number of minority voters that need to be in a district. The Court has held that legislators are not required to identify "precisely" what size minority population is required in an ability-to-elect district. *ALBC*, 135 S. Ct. at 1273. A legislature might have reason to believe that, in a specific district, a particular population is necessary to comply with the Voting Rights Act, even though that population would not be necessary elsewhere in the State. But there is no constitutional requirement that a Legislature study the issue instead of establishing a single state-wide target for all ability-to-elect districts. State legislators, not political science professors, are charged with the primary task of redistricting.

Moreover, as a practical matter, it is not feasible for legislators to hire experts to conduct numerous district-specific voter turnout and registration studies as part of a state-wide redistricting. In Alabama, for example, there are eight majority-minority Senate districts and at least 27 majority-minority House districts. *ALBC*, 135 S. Ct. at 1263. In Virginia, there are 12 majority-minority House districts. *Bethune-Hill*, 2015 WL 6440332 at *2. As of 2013, there were 113 Congressional majority-minority districts in the United Sates. *See* Ballotpedia, Majority-Minority Districts at https://ballotpedia.org/Majority-minority_districts (last visited Dec. 28, 2015).

The Equal Protection Clause is about an equal playing field, not full employment for political scientists. The Virginia Legislature did not need an expert's district-specific analysis to conclude that a 55% black majority was reasonably necessary to ensure that black voters could elect their candidate of choice in District 3.

C. A racial gerrymander exists only when the legislature could have achieved its political goals in a different way that achieves significantly greater racial balance.

The district court's third error was its conclusion that the plaintiffs had established a racial gerrymander even though the State's plan is the only known plan that achieved its drafters' political goals.

A racial gerrymandering claim cannot succeed absent proof of a realistic alternative plan that achieves the legislature's political objectives in a meaningfully different way. In *Easley*, this Court held that a *Shaw* plaintiff must, "at the least," produce an alternative plan showing that the legislature could have achieved its "legitimate political objectives" while also achieving "significantly greater racial balance." 532 U.S. at 258.

Implicit in the *Easley* Court's reasoning are two bedrock principles. First, there are important political goals that drive every redistricting effort, and any alternate plan that does not take those into account is illegitimate on its face. And second, no plan is perfect. If those who wish to challenge a

redistricting plan can succeed simply by showing some marginal increase in racial balance, redistricting challenges will cease to be about promoting racial equality and instead will become powerful political weapons. The racial gerrymandering cause of action will be nothing more than a partisan tool.

This danger is particularly acute given the high stakes of every redistricting effort and the multitude of competing and often conflicting priorities of those involved in the process. "Legitimate political goals" and "traditional districting principles" are varied, and often mutually exclusive. They include "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, incumbency protection, and political affiliation." *ALBC*, 135 S. Ct. at 1270 (citations and internal quotation marks omitted). Sometimes observing one of the principles requires disregarding another. A legislature may choose to keep a county whole, for example, even if it makes a district less compact. Or it may choose to split a precinct it would like to keep whole, in order to avoid an incumbent conflict. In the push-and-pull of politics, there is virtually no limit to the choices a legislature has when drawing district lines, and that remains true even when the legislature remains faithful to traditional districting principles. It depends on which of those principles manifest as most important on a given occasion, and reasonable line-drawers can disagree about which principles take priority at different times.

But when the dust clears, the final product will result in political winners and losers. Redistricting

"must end at some point," but "that point constantly recedes if those who litigate need only produce a plan that is marginally 'better.'" *Gaffney v. Cummings*, 412 U.S. 735, 750 (1973). Requiring that those who would launch a race-based challenge to the outcome of the redistricting process must produce an alternative plan that takes into account political objectives and demonstrates "*significantly* greater racial balance" ensures that political fights are in the legislature, instead of court. *Easley*, 532 U.S. at 258 (emphasis added).

D. For strict scrutiny to apply, the use of race must *conflict* with other race-neutral districting principles.

The lower court's fourth error was in finding that race predominated in part because a legislator testified that compliance with § 5 was "paramount" and that the federal mandate was "nonnegotiable." J.S. App. 2a. The question in a racial gerrymandering case is not whether the Voting Rights Act is subjectively important, but whether a redistricter's race-related objectives *conflicted* with its race-neutral objectives. *See Bethune-Hill*, 2015 WL 6440332 at *15, citing *Page v. Virginia State Bd. of Elections*, No. 3:13CV678, 2015 WL 3604029, at *27 (E.D. Va. 2015) (Payne, J., dissenting).

Many factors go into a state-wide redistricting plan. A redistricter might choose to move one precinct over another with awareness of the racial composition of each, but may have many motives for the move, such as producing a district that favors a political party, connecting members of a community

of interest, *etc.* "[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes." *Shaw I*, 509 U.S. at 646. Because this Court is aware of these complications, it has held that strict scrutiny applies only when race was "not simply . . . a motivation for the drawing of a majority-minority district, but the *predominant* factor motivating the legislature's districting decision." *Easley*, 532 U.S. at 241 (citation and internal quotation marks omitted). Strict scrutiny applies only upon demonstration that "'race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines.'" *Bush*, 517 U.S. at 958 (quoting *Miller*, 515 U.S. at 913.)

The Court reiterated these principles in *ALBC*, underscoring that predominance requires a showing that race-neutral districting principles *conflict* with a drafters' goal of complying with the Voting Rights Act. There, the U.S. Solicitor General argued that "predominance" is shown only where race-neutral objectives and a race-related objective *conflict*. Trans. of Oral Argument, *Alabama Democratic Conference v. Alabama*, 13-895, 13-1138, 31:18–32:6, 37:15–38:2 (Nov. 12, 2014). This Court agreed and explained that a racial gerrymandering plaintiff must "prove that the legislature subordinated traditional race-neutral districting principles"—including the "offsetting" principles of "incumbency protection" and "political affiliation"—"to racial considerations." *ALBC*, 135 S. Ct. at 1270 (quoting *Miller v. Johnson*, 515 U.S. at 916 (emphasis in *ALBC* omitted). If a

race-related goal *coincides* with a race-neutral principle, instead of *conflicting* with it, then a redistricter could not have "subordinated" that principle to "racial considerations." *Id.*

Testimony that a legislature made compliance with federal law its highest priority does not show that race "predominated." *Of course* producing a legal plan is the goal. Compliance with the Voting Rights Act is not optional. Any other rule would render constitutional compliance with federal law impossible. But the importance of the Voting Rights Act is irrelevant to the analysis of whether compliance with the Voting Rights Act required the Legislature to do anything that conflicted with other race-neutral objectives, such as incumbent protection. The Court should emphasize that the *Shaw-Miller* standard requires a showing of *conflict* between race-related and race-neutral objectives.

* * *

State actors should not be "trapped between the competing hazards of liability" by the imposition of unattainable requirements under the rubric of strict scrutiny. *Wygant v Jackson Bd. of Educ.*, 476 U.S. 267, 291 (1986) (O'Connor, J., concurring in part and concurring in judgment). But the lower court's reasoning would trap legislatures in exactly that way.

The Court should reverse and make clear that (1) a 56% majority-minority district is not a racial gerrymander just because it could have been a 53% majority-minority district; (2) States are not required to make separate findings for each majority-minority district of what precise size majority is necessary for

a group to elect its candidate of choice; (3) every plaintiff in a racial gerrymandering claim must produce an alternative map showing that the legislature could have achieved its political goals in another way while achieving *significantly* greater racial balance; and (4) to show that race predominated over traditional districting principles, a plaintiff must show that the use of race actually conflict with those principles.

CONCLUSION

The Court should reverse the judgment of the Eastern District of Virginia.

Respectfully submitted,

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APPENDIX A

Representative Cases Filed Since 2010 Asserting Racial Gerrymandering Claims

Covington v. North Carolina, No. 1:15-cv-00399 (M.D.N.C.)

Dickson v. Rucho, No. 11-CVS-16896 (N.C. Super Ct., Wake County)

NC State Conference of Branches of the NAACP v. North Carolina, No. 11-CVS-16940 (N.C. Super Ct., Wake County)

Backus v. South Carolina, No. 3:11-cv-03120 (D.S.C.)

Buckley v. Schedler, No. 3:13-cv-00763 (M.D. La.)

Ceasar v. Jindal, No. 6:12-cv-02198 (W.D. La.)

Radogno v. Illinois State Board of Elections, No. 1:11-cv-04884 (N.D. Ill.)

Committee for a Fair and Balanced Map v. Ill. State Bd. of Elections, No. 1:11-cv-05065 (N.D. Ill.)

Baldus v. Brennan, No. 2:11-cv-00562 (E.D. Wis.)

Jeffers v. Beebe, No. 2:12-cv-00016 (E.D. Ark.)

Radanovich v. Bowen, No. S196852 (Cal. Sup. Ct.)

Bethune-Hill v. Va. State Bd. of Elections, ___ F.Supp.3d ____, 2015 WL 6550332 (E.D. Va. Oct. 22, 2015)

Perez v. Texas, No. 5:11-cv-360 (W.D. Tex.)